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Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1969

No. 1543

IROQUOIS INDUSTRIES, INC.,

Petitioner,

v.

SYRACUSE CHINA CORPORATION, WILLIAM R. SALISBURY, FOSTER T. RHODES, MALCOLM E. KELLEY, JAMES SALISBURY PASS, ROBERT M. SALISBURY, HAROLD C. BROWN & CO., INC., HAROLD C. BROWN, C. HERBERT FEUCHTER, and TOWLE MANUFACTURING COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTORY STATEMENT

Petitioner seeks review upon the grounds of an alleged conflict among the Circuits and the claimed importance of the issue involved in the application of the Federal securities laws. Petitioner's brief dwells at length upon the merits of the questions involved.

This brief will not deal with the merits of the case. Rather, it will demonstrate that because of an amendment to the securities laws subsequent to the events in this case,

the issues are no longer of significant import except to the litigants themselves, and, further, that there is not, in fact, any conflict among the Circuits with respect to the issues raised by petitioner.

STATEMENT OF THE CASE

Petitioner's Statement of the Case, insofar as it quotes from the opinion of the Court of Appeals, is not challenged. Insofar as it treats as fact that which has only been alleged in petitioner's complaint and insofar as it describes the case as involving "an undisputed violation of federal law" (Petition, p. 7), it must be emphasized that the appeal to the Court of Appeals arose out of the dismissal of the complaint for failure to state a cause of action. Although affidavits were submitted in support of a companion motion for summary judgment — affidavits which challenged and refuted virtually every significant allegation of the complaint — neither the District Court nor the Court of Appeals found it necessary to act upon that motion.

REASONS FOR DENYING THE WRIT

I

The passage of the tender offer amendments to the Securities Exchange Act in 1968 has rendered the decision in this case unimportant.

This case is now devoid of public interest.

The Williams Act § 3, 15 U.S.C. § 78n (d)-(f)) (1963), as amended, (Supp. 1970) added several provisions to the Securities Exchange Act which were designed to regulate not only the conduct of the tender offeror but that of the

target company as well. The Act added a new Section 14 (e) to the Exchange Act which reads as follows:

> "It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, *in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation.* (Emphasis added)

The italicized language clearly serves to eliminate the purchaser-seller limitation in the area embraced by the tender offer legislation. Thus, whether the limitation should be read out of Rule 10b-5 in tender offer cases like the present one is academic.

In *Butler Aviation International, Inc.* v. *Comprehensive Designers, Inc.*, —— F. 2d ——, CCH Fed. Sec. L. Rep. ¶ 92,557 (2d Cir. 1970) the target of an exchange offer brought suit under both Section 14 (e) and Rule 10 b -5. The Court concluded (p. 98, 542, fn. 1):

> "Inasmuch as we agree that standing exists under § 14 (e), at least as to the misstatements in the annual report, see Electronic Specialty Co. v. International Controls Corp. supra, 409 F. 2d at 944-46, we need not pass on standing under Rule 10 b-5."

Section 14 (e) applies to all companies whose stock is listed on a national exchange or registered under Section 12 (g) of the Securities Exchange Act. This includes all companies having at least $1,000,000 in assets and 500 or more stockholders. Thus, it applies, as a practical matter, to all companies which are at all likely to be involved in tender offers.

II

The Circuits are not in conflict over the issues presented in this case.

The Court of Appeals below sustained the dismissal of the complaint upon the ground that the plaintiff failed to meet the so-called "purchaser-seller" requirement of Rule 10 b -5 under Section 10 (b) of the Securities Act of 1934 (App. A, pp. 34, 41). That is, the plaintiff failed to allege that it purchased or sold securities in reliance upon any alleged misrepresentation by defendants.

Although petitioner argues at length for the abolition of the purchaser-seller requirement expressly stated in Rule 10 b -5, it fails to cite a single case in which the requirement has been read out of the rule by any Circuit.

What in fact has occurred is that the requirement, as first enunciated by the Second Circuit 18 years ago in *Birnbaum* v. *Newport Steel Corp.*, 193 F. 2d 461 (2d Cir.), cert. denied, 343 U. S. 956 (1952), has since been applied, with discriminating care, to a large variety of factual circumstances with varying strictness, but primarily with a view to "what will best accomplish the purposes of the legislature." *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F. 2d 937, 946 (2d Cir. 1969).

The decision most heavily relied upon by petitioner, *Kahan* v. *Rosenstiel*, —— F. 2d —— CCH Fed. Sec. L. Rep. ¶ 92,589 (3rd Cir. 1970), clearly illustrates the point. That was a suit to recover attorneys' fees, the plaintiff claiming he had induced a change in the terms of an exchange offer to the benefit of minority stockholders. The plaintiff claimed, on behalf of the minority shareholders, that the controlling shareholders had rejected a profitable merger proposal in favor of another proposal which in-

volved payment of a substantial premium to the controlling shareholders. The analysis of authorities by the Court of Appeals shows that *all* of the Circuits acknowledge and apply the purchaser-seller requirement while some have given it a liberal application in certain circumstances where injunctive relief is appropriate. Thus, the Second, Sixth, Seventh and Eighth Circuits have all adhered to the principal of the purchaser-seller requirement, *Greenstein* v. *Paul*, 400 F. 2d 580 (2d Cir. 1968); *Britt* v. *Cyril Bath Company*, 417 F. 2d 433 (6th Cir. 1969); *Jachimiec* v. *Schenley Industries, Inc.*, No. 15024 (7th Cir. 1965), cert. denied, 382 U. S. 841 (1965); *Greater Iowa Corporation* v. *McLendon*, 378 F. 2d 783 (8th Cir. 1967), while the Second and Sixth Circuit have found occasion to liberalize the application of the requirement in certain injunction cases, *Mutual Shares Corp.* v. *Genesco, Inc.*, 384 F. 2d 540 (2d Cir. 1967); *Britt* v. *Cyril Bath Company, supra* (expressly adopting the Second Circuit approach as stated in the *Mutual Shares* case).

The Third Circuit, in the *Kahan* case, after analyzing the authorities, similarly agreed with the Second Circuit that a discriminating application of the purchaser-seller requirement was appropriate particularly in injunction cases. The Court noted that equitable relief to forestall the making of future sales by investors based upon incomplete or inaccurate information might be in order even though no such sales had yet occurred. Clearly, the Court did not repudiate the purchaser-seller limitation.

Petitioner is in error in asserting, on pages 8 and 9 of its brief, that the decision in *Errion* v. *Connell*, 236 F. 2d 447 (9th Cir. 1956) is in direct conflict with the decision in this case. The plaintiff in the *Errion* case had exchanged securities for an interest in land, and she was thus clearly a "seller" of securities. The only question before the Court

in this connection was whether the intermixture of land and securities in the same transaction would preclude the application of the Securities Act of 1934. The Court concluded that the Act was applicable without any discussion of the "purchaser-seller" limitation.

Much emphasis is placed by petitioner upon *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F. 2d 787 (2d Cir. 1969) decided about the same time as the present case. (Petitioner's brief pp. 17-18). That case, like the present one, involved a tender offer by the plaintiff company to acquire control of another company. The alleged violation was committed by a third company which also sought control of the target company. The plaintiff was forced by the third company's manipulations and threat of an antitrust divestiture action to dispose of its shares in the target company. Expressly distinguishing its decision in the present case, the Court characterized the plaintiff as a forced seller within the rationale of the decision in *Vine* v. *Beneficial Finance Co.*, 374 F. 2d 627 (2d Cir.), cert. denied, 389 U. S. 970 (1967).

The Court in *Crane* succinctly stated the principle which has guided its application of the purchaser-seller limitation (p. 798):

> "The purchase-sale requirement must be interpreted so that the broad design of the Exchange Act, to prevent inequitable and unfair practices on securities exchanges and over-the-counter markets, is not frustrated by the use of novel or atypical transactions. A. T. Brod & Co. v. Perlow, supra, 375 F. 2d at 397. 'In determining who has standing to enforce duties created by statute, a court's quest must be for what will best accomplish the purposes of the legislature.' Electronic Specialty Co. v. International Controls Corp., 409 F. 2d 937, 946 (2d Cir. 1969). The purpose of Congress in enacting sections 9 (a) (2) and 10 (b) was to protect the investing public from manipulation and deception by the use of devices which defrauded or misled investors in securities transactions."

It is particularly significant that petitioner in the present case moved in the Court of Appeals for leave to file a second application for rehearing and for a hearing *en banc* on the ground of alleged conflict with the *Crane* case, and a similar application was made and denied in the *Crane* case. Thus, the Court of Appeals, focusing directly upon the question, saw no conflict.

Even if the distinguishing facts in the *Crane* case be ignored, the most that could be said would be that a conflict existed *within* a single circuit, not *among* circuits. Such a conflict would not, of course, warrant review by this Court. Harlan, *Manning the Dikes,* 13 Record Assn. Bar City of N. Y. 552 (1958).

Enough has been said concerning the facts of the principal cases in this area to demonstrate that this is not a matter of the various Circuits lining up on either side of essentially identical issues arising out of similar facts. Quite to the contrary, the cases have involved an extraordinary variety of factual patterns with the decisions evidencing a consistent effort to apply — not to reject — the purchaser-seller limitation in a manner which will best effectuate the purposes of the Act.

This case and *Crane* involved tender offers. *Kahan* involved injury to minority shareholders by sale of the controlling shares for a premium. *Greater Iowa* involved the formation of a voting trust to gain control of a company without registration of the trust offering. *Britt* involved alleged manipulation by management to enable the company to repurchase minority shares at depressed prices.

To attempt to line up these cases, as petitioner does, simply on the basis of whether or not the plaintiff was held to have standing under the "purchaser-seller" requirement, and thereupon to declare a conflict in the Circuits, is

to ignore the fundamental differences in the facts of the cases as well as the careful effort of the courts to apply the requirement with common sense.

CONCLUSION

There is neither an important question concerning the administration of the securities law involved in this case nor a conflict among the Circuits and accordingly the petition for a writ of certiorari should be denied.

Respectfully submitted,

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